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SOME PROBLEMS WITH "ORIGINS"

Stephen A. Conrad*

I.

Back in 1984, when many in the academic community were beginning to plan for the long Bicentennial Moment (1987-1991), Stanley Katz published an essay entitled *The Problem of a Colonial Legal History*. The essay appeared in a volume that collected assessments, by leading experts, of the state of the art in a number of the respective fields of scholarship that share "Colonial British America" as their general topic.¹ In assessing the variety of current work in the particular field of colonial American *legal* history, Katz's essay sounded notes ranging from "lamentation" to "caution" to "gratification", not to mention evident pride both in the recent growth of the field and in examples of important "intellectual progress" within it. But from first to last and overall, Katz's essay tended to dwell on the circumstances that have continued² to make both the place and the practice of writing on colonial American legal history problematic.

Especially to readers with an eye on the Bicentennial Moment, Katz's essay gave, or should have given, pause. For just when so many historians were gearing up for expeditious output of anniversary scholarship on the Constitution of 1787 and the Bill of Rights, Katz pointed out that, in America, "Constitutional history [as a professional scholarly discipline] is certainly not dead, but it is not flourishing and its significance for colonial history is not altogether obvious."³ Even more troubling to me were Katz's observations about the continuing influence on early American constitutional historiog-

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1. Stanley N. Katz, *The Problem of a Colonial Legal History*, in *COLONIAL BRITISH AMERICA: ESSAYS IN THE NEW HISTORY OF THE EARLY MODERN ERA* 457-89 (Jack P. Greene & J.R. Pole eds., 1984).

2. Cf. Stanley N. Katz, *Looking Backward: The Early History of American Law*, 33 U. CHI. L. REV. 867 (1966) (book review) (an early lament from Katz at the relative neglect of the study of colonial American legal history).

3. Katz, *supra* note 1, at 463; See also Harry N. Scheiber, *Introduction: the Bicentennial and the Rediscovery of Constitutional History*, in *THE CONSTITUTION AND AMERICAN LIFE* 7-14 (David Thelen ed., 1988).

raphy of the traditional "origins"-and-"sources" method of English legal historians:

[This] method not only focused on earlier periods of modern history, but in the hands of its lesser practitioners it tended to be teleological and Whiggish, two attributes that were accepted rather uncritically by American practitioners of the art. The result was particularly disastrous, and it is still with us — the tradition of discovering the "origins" of everything, *especially the Constitution of 1787 and the American Bill of Rights*.⁴

What, one might ask, could be so "disastrous" about trying to "discover" the origins of the Constitution and the Bill of Rights? Much of Katz's answer, in effect, was that this genealogical enterprise of discovery has led to some "very crude assumptions about the general character of the colonial legal system."⁵ Moreover, these assumptions have come to cohere in a predominant historical "model" which takes as its premise that "the colonists must have had preformed notions of appropriate legal behavior and that in order to understand their behavior, it was [and is] the primary task of the legal historian to understand the *original* pattern."⁶ Historical scholarship written on this premise has led to a widely endorsed interpretive conclusion that:

The similarity of the colonial legal system to the [English] common law, when placed in the context of British constitutionalism in the seventeenth century, resulted in colonial dissatisfaction with British authoritarianism both in 1689 and, more important, in the Revolutionary era. The Americans of the late eighteenth century were thus confronted with the apparent contradiction of a commitment to common-law values and procedures and a rejection of things British, which they solved by anti-British rhetoric and common-law reality.⁷

Katz himself did not propose to dispense entirely with this conclusion or with the model that generates it.⁸ But he did object that the model

4. Katz, *supra* note 1, at 458 (emphasis added).

5. *Id.* at 476.

6. *Id.* at 477.

7. *Id.* at 476.

8. *Id.* ("It is, in fact, not a bad model, but it needs to be articulated more carefully than hitherto has been done.") In effect, Katz tried to do something towards that end in Stanley N. Katz, *The American Constitution: A Revolutionary Interpretation*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 23-37 (Richard Beeman et al. eds., 1987).

has made for an "approach to the constitutional history of the early republic [that] has focused so devastatingly on the intentions of the framers and the late eighteenth-century governmental experience. . . . [And this is] essentially a diversionary approach, distracting us from concentrating upon the primary phenomena which we ought to be studying."⁹

Katz explained what he meant by such "primary phenomena" by emphasizing that what he would most like to see — besides continued progress in "demonstrating the interconnectedness of colonial and national legal history" — is the development of a "systematic understanding of how law relates to society." By putting a premium on this systematic understanding, we could better account for "the cultural changes that transform the American understanding of such concepts as authority and property."¹⁰

I don't presume to give here anything like a full restatement of the nuanced historiographical commentary that Katz offered in his 1984 essay. But especially, I think, in the selected comments I have quoted above, Katz's essay does afford a notably apt and authoritative point of departure for offering a few simple comments of my own about some of the problems I see, now rather late in the Bicentennial Moment, with the accrued historical literature on the so-called "origins" of the Bill of Rights.

II.

Going into the Bicentennial Moment, the undislodged predominance of the old "origins"-and-"sources" approach to the Bill of Rights was so pervasive that it shouldn't be too surprising that its significance largely escaped notice, much less criticism. Perhaps nothing is more emblematic of the predominance of this approach as applied to the Bill of Rights than the "Table for Sources of the Provisions of the Bill of Rights" that Edward Dumbauld included in his 1957 book *The Bill of Rights and What It Means Today*.¹¹ And, as Dumbauld's "table" reflects, his approach to the origins of the federal Bill of Rights forthrightly ignored the colonial period

9. Katz, *supra* note 1, at 477.

10. *Id.* at 484, 474; cf. Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239 (1989) (especially at 245-258) (examining the intellectual context of the views of the American framers and ratifiers on how constitutional change accommodates social change).

11. Edward Dumbauld, *State Precedents for the Bill Of Rights*, 7 J. PUB. L. 323 (1958) (especially at 343-44).

altogether, and, indeed, looked back beyond 1776 only to advert occasionally to the 1689 *English* Bill of Rights. The question is never even raised in Dumbauld's book about the possible relevance of a century and a half of colonial legal experience of attempting to articulate and secure a variety of rights that was arguably greater than (and almost inevitably different from) the scope of rights discourse in England during the same period. In fact quite recently, even so sophisticated a reader as Akhil Amar could justifiably remark that, although Dumbauld's book "offers little in the way of constitutional theory," it remains today "[t]he best modern account of the Bill."¹²

By contrast, in 1955 Robert Rutland *had* at least raised this question that Dumbauld in 1957 either overlooked or set aside. However, after effectively raising the question, Rutland then proceeded to give it very short shrift. In a book that in its title would seem to have eschewed historical inquiry reaching back before 1776, Rutland nevertheless affirmed the necessity of just such inquiry in any comprehensive historical account of the Bill of Rights. He began the preface of his *The Birth of the Bill of Rights, 1776-1791* with so forceful a testament to the rich complexity and diversity of the colonial origins of the Bill of Rights that his opening paragraph deserves to be quoted in full:

This book represents an effort to draw together in one volume the story of how Americans came to rely on legal guarantees for their personal freedom. The English common law, colonial charters, legislative enactments, and a variety of events in the thirteen colonies were the chief elements contributing to the rationale for a bill of rights. Throughout the research and writing it was obvious that no single man, no single occurrence, could be set apart for special distinction. The facts show that the Federal Bill of Rights and the antecedent state declarations of rights represented, *more than anything else, the sum total of American experience and experimentation with civil liberty* up to their adoption. It is worth noting that the Salem witchcraft trials and the Federal Bill of Rights virtually opened and closed the 18th century; and these historical incidents indicate *the tremendous American intellectual advancement during that stirring span of time*.¹³

12. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 n.3 (1991).

13. ROBERT A. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at ix (1955) (emphasis added) (See the 1991 Bicentennial Edition of this book, which I received after I submitted the instant article to the publisher).

Rutland thus affirms the need to attend carefully to *eighteenth-century* colonial American *legal* culture, broadly construed, in accounting for the American bills of rights of the Revolutionary and Founding years. Yet immediately following this call not to neglect the story of "the tremendous American intellectual advancement" from the 1690's to the 1790's, Rutland moves to a chapter on "The English Beginnings," and then to a chapter on the "Colonial Achievement" that breaks off with a word on the 1701 Pennsylvania Charter of Liberties as not only the highwater mark of that achievement but also more or less the last word that Rutland has to say on the colonial period. In the next chapter he jumps ahead to the 1760's and proceeds quickly to "Mr. [George] Mason's Proposal" of a Virginia Declaration of Rights in the Revolutionary spring of 1776.

Still, if only unintentionally, Rutland did nicely call attention to the problem of the virtual blackout in much general historical scholarship when it comes to American experience with the definition and protection of "rights" between the imperial watershed of the Glorious Revolution in England and the ultimate imperial crisis of 1765-1776 in America.¹⁴ And, if Dumbauld's book remains the "best" modern account of the Bill of Rights, Rutland's may well remain the most widely read: It was reissued in a slightly "revised edition" in 1983, in both hard cover and paperback; and even the leading college textbook on American history (which is edited by a preeminent colonialist) has continued to refer students to Rutland's book alone by way of a handy introduction to the origins of the Bill.¹⁵

In the area of *legal* scholarship, however, I would hazard that it is the various contributions of Bernard Schwartz on the origins of the Bill of Rights that have been most frequently consulted and relied on — and not only by Schwartz's fellow academics on law faculties but by courts as well.¹⁶ In 1971 Schwartz published,¹⁷ and then in

14. Something of the same point is made by Jack P. Greene in *From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution*, 85 S. ATLANTIC Q. 56, 74 (1986) (Greene takes to task Thomas C. Grey for Grey's misconception that "during the colonial period Americans had not been much given to debate over issues of constitutional theory."); cf. JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES 1607-1788* (1986) (wherein Greene documents the continual articulate concern of the colonists over problems of legal and constitutional rights within the context of empire).

15. BERNARD BAILYN ET AL., *THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE* 253 (3rd ed., 1985). A fourth edition is due out in the spring of 1992.

16. See William J. Brennan, Jr., *Tribute to Professor Bernard Schwartz*, 1988 N.Y.U. ANN. SURV. AM. L. at ix (1988).

17. BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* (1971).

1980 substantially republished,¹⁸ an important collection of documents-*cum*-commentary that was “presented,” as he said, “from the editor’s point of view[, in order to] emphasize those aspects of the development of the Bill of Rights which he considers of primary significance.”¹⁹ And Schwartz avowed that the history of “the Colonial period” was one of those aspects. But, in fact, his attention to colonial America before the onset of the Revolution is entirely restricted to eleven colonial charters or analogous public documents, leaving off in point of time — again — with the 1701 Pennsylvania Charter of Liberties. Nothing at all that happened in America during the six decades between the promulgation of that charter and the Writs of Assistance controversy is deemed worthy of attention.

When in 1977 Schwartz produced his own one-volume synthetic history of the Bill of Rights, it faithfully reflected his formalistic “origins”-and-“sources” approach. After a first chapter on “English Antecedents,” the book turns to “Colonial Charters and Laws” in a chapter that moves through the list of eleven to 1701, as in Schwartz’s earlier documentary collections, and then closes with a three-page summary characterization of the “Colonial Pattern.” There Schwartz asks us to “recall that both the English Bill of Rights and the colonial documents discussed did not really have the status of constitutions, since they were subject to alteration or repeal at the discretion of the legislature.”²⁰

I have no reason to dispute Schwartz’s point as thus formulated. But I can’t help but think that this very point does not at all justify Schwartz in going as far as he does to marginalize, indeed, largely to ignore a great part of the indigenous colonial background of American bills of rights. To me, his point hardly disposes of, rather, it raises important questions about what we might agree to call the “proto-constitutionalist” character of pre-Revolutionary rights discourse in eighteenth century America: If not significant as “constitutional” claims, strictly speaking, what then was the suasive

18. BERNARD SCHWARTZ, *THE ROOTS OF THE BILL OF RIGHTS* (1980).

19. *Id.* at xxiii.

20. BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 52 (1977); *cf. id.* at 53 (“The American Revolution was the all-important link between colonial liberties and the Federal Bill of Rights. Until Independence, there was no legal authority to draw up constitutions and bills of rights. . . .”) (A 1992 Expanded Edition of this book merely reprints the new edition, with an added “Afterword.”). For yet another recent example of the customary neglect of the history of American rights discourse between the 1701 Pennsylvania Charter of Liberties and the Writs of Assistance controversy, see ROBERT S. PECK, *THE BILL OF RIGHTS & THE POLITICS OF INTERPRETATION* 40-41 (1992).

significance of the various rights claims that early and mid-eighteenth-century Americans put forward on the basis of their colonial charters and other signal public documents? Did the "rights" in question represent claims that were somehow in some quarters considered "constitutional," even if not in the sense that we mean today? Did these "rights" in any way import "legal," as distinguished from "constitutional," claims? Did they at times amount to quasi-legal (e.g., equitable²¹) or perhaps even extra-legal claims — or perhaps something else entirely? These are questions that look not to a collection of a few "great" documents that plot a progress of liberty, but instead to the "historicity" of rights discourse²² — to the complex meanings of rights claims in context. These are questions that look to "ordinary," quotidian practice, including legal, political, and social practice.

And they are questions not given sustained attention even in some of the best historical writing that *has* of late tried to expand somewhat beyond the genealogical, documentarian "origins"-and-"sources" approach to the Bill of Rights. Often the best scholarship does not do, or even try to do, as much as it acknowledges needs to be done to give us a historically authentic account of the American "origins" of American bills of rights. Witness how my fellow commentator in this symposium Donald Lutz concludes his chapter on "The Problem of Origins" in his 1988 book *The Origins of American Constitutionalism*, with a passage that seems to balk at pursuing the admittedly important task of explaining "origins" in terms of the "dynamic" colonial culture of rights claims in actual "practice":

The seventeenth and eighteenth centuries were a time of extraordinary ferment in political thought and action among English-speaking peoples. To say that political covenants and compacts from a biblical model and that colonial charters contain the foundation elements that appeared in American constitutions a century and a half later is not a full-blown constitutional theory. The meanings of terms change, the practices surrounding institutions will evolve, and

21. See, e.g., PETER C. HOFFER, *THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 47-79 (1990); see also Peter C. Hoffer, *The Declaration of Independence as a Bill in Equity*, in *THE LAW IN AMERICA, 1607-1861*, at 186-209 (William Penack and Wythe W. Holt, Jr. eds., 1989).

22. Cf. MAURICE W. CRANSTON, *WHAT ARE HUMAN RIGHTS* 81 (1973) (I owe this reference to Prof. Lois G. Schworer, who endorses, as I mean to here, Professor Cranston's emphasis on the importance of interpreting rights claims in their proximate historical context.).

completely new theories will develop to justify familiar practices. Even so, a systematic examination of the political literature written by Americans between 1760 and 1805 will illustrate the continued connection with early colonial documents.²³

As Lutz himself takes care to point out, *especially* when it comes to the question of what "generate[d] the core of [early American] bills of rights," the "profound effect of the common law," as the colonies had variously "wove[n] it into their respective political traditions," is especially important.²⁴ Nevertheless, relying, he says, largely on A. E. Dick Howard's 1968 book *The Road From Runnymede*,²⁵ Lutz, in effect, subscribes to the old historiographical premise that the best way to understand how the common law "evolved" in America is in terms of Americans' "preformed notions" of the original English pattern.²⁶ As enlightening as this approach is in some respects, its incidental costs are great.

In important and influential books like those by Dumbauld, Schwartz, Howard, and Lutz that I have mentioned, this approach leads, for example, to the omission of any reference whatsoever to the historic 1735 trial of the colonial publisher John Peter Zenger for seditious libel against the royal governor of New York. Here was a trial that, as one historian of the American Bill of Rights tells us, "firmly established in the American colonies, in 1735, the rights of juries that were not gained in England until 1792. It established, at least in the minds of the people, that truth was a defense to libel."²⁷

23. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 12 (1988).

24. *Id.* at 60, 59; see also FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 12-14, 17-19, 22, 33-37 (1985).

25. A. E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968).

26. See *supra* text accompanying note 6.

27. IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 179 (1965). cf. GILMAN OSTRANDER, *THE RIGHTS OF MAN IN AMERICA, 1606-1861*, at 82 (1969). "The Zenger case had no direct effect upon the law of the land, and not until the nineteenth century was truth officially admitted in a court of law as favorable evidence in certain libel cases. Nor need the judges in the Zenger case have allowed the decision of the jury to go unchallenged, had they chosen to overrule it. But in a dramatic trial, the principle had been asserted successfully that a newspaper ought to be free to criticize the government by presenting statements of fact. Newspaper editors, on the eve of the Revolution, were able to feel reasonably secure in this right, however vulnerable they might technically be in point of law." See Rutland's brief treatment of the Zenger case in the 1991 Bicentennial edition of his general history of the Bill of Rights cited *supra* note 13, at 22-23, 235. For the most historically informed appreciation of the Zenger case, see the Editor's Introduction, JOHN ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY* (Stanley N. Katz ed., 1972) (especially at 1-2, 34-35).

Thus, in my pleading here for more attention to the indigenous colonial background of American bills of rights, I don't consider that I am disregarding the premium that our patristic constitutional culture manifestly places on the extraordinary, Revolutionary "founding" period of the late eighteenth century. To the contrary, I'm pleading that we take the founders even more seriously than some of our best scholarship seems to, particularly when we hear the founders themselves directing our attention back to some of the colonial American "origins" of bills of rights. After all, no less a founder than the brilliant and forceful Gouverneur Morris

"is said to have stated that instead of dating American liberty from the Stamp Act [of 1765], he traced it to the persecution of Zenger; because that event revealed the philosophy of freedom, both of thought and speech, as an inborn human right, so nobly set forth in Milton's speech for the "Liberty of Unlicensed Printing."²⁸

In the two passages I have just quoted from Irving Brant's 1965 book *The Bill of Rights: Its Origin and Meaning*, I have turned at last to the work that the eminent constitutional historian Leonard Levy called in 1984 "the best written and most comprehensive survey"²⁹ of the Bill. Yet, even Brant's distinctive effort at comprehensiveness does not go as far as I would like in transcending some of the problems that Stanley Katz has distinguished in the "origins"-and-"sources" approach. For example, despite Brant's highlighting of a celebrated American trial or two,³⁰ he portrays colonial American jurisprudence as overwhelmingly derivative of English legal and political norms. There is little attempt to understand *how* legal or legalistic rights claims in colonial America were functionally related to changes in American society at large. As Donald Lutz himself emphasized in open discussion at our symposium, such an understanding of the function of rights claims would require us to look beyond the respective internal discourses of law and politics to other categories of human "behavior." Alas, the historiography of colonial American law and constitutionalism is not yet generally very well informed by such external perspectives.

28. BRANT, *supra* note 27, at 180 (quoting from a 1906 dissenting judicial opinion of a Justice of the Supreme Court of Colorado).

29. Leonard W. Levy, *Bill of Rights*, in *ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY* 125 (Jack P. Greene ed., 1984).

30. Cf. BRANT, *supra* note 27, at 193-95 (discussing not only the *Zenger* case, but also the 1770 New York trial of Alexander MacDougall for seditious libel).

III.

Lest my concern with the indigenous early American law-in-practice, common-law background of American constitutionalism seem merely antiquarian and academic, I pause to invoke repeated statements of concern in the same vein from the bench. Ellen Peters, Chief Justice of the Supreme Court of the State of Connecticut, has lately called for both a reinvigoration of common-law approaches to state constitutional law in general,³¹ and, more particularly, a better informed understanding of the "common law antecedents of constitutional law" in her home state. Indeed, she professes "confiden[ce] that . . . traditional learning in the common law will enable us to meet the [current] challenge [of] assigning independent meaning to independent state constitutions."³² Now that we are entering into a contemplated "'constitutional revolution' in the judicial interpretation of individual rights provisions of state constitutions,"³³ it would seem that a historically informed understanding of the common-law background of our various state constitutions and their traditions is potentially more important than ever before, and not least with respect to controversies that turn on provisions of the several bills of rights.

In significant ways, however, the problem of our inadequate understanding of the colonial element in this background goes beyond the chronic basic problem of "the paucity of historical writing on law in the colonial period."³⁴ For example, I think the recent remark of historian Jack Rakove is quite correct: that "[t]he most important work³⁵ [we yet have] on pre-Revolutionary conceptions of rights" is John Phillip Reid's volume *The Authority of Rights*, in Reid's series on the "Constitutional History of the American Revolution."³⁶ In fact, with that volume and others in his other series,³⁷ Reid has

31. Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583 (1986).

32. *Id.* at 593; cf. Ellen A. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*, 53 ALB. L. REV. 259 (1989).

33. Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 42 J. LEGAL EDUC. 244 (1991).

34. Frank A. Cassell, Book Review, 48 WM. & MARY Q. 129 (1991).

35. Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 248 n.5 (1990).

36. JOHN P. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986).

37. See e.g., JOHN P. REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* (1988); JOHN P. REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* (1989).

rather come to dominate the current marketplace of ideas on this crucial question of what rights talk really meant to the latter-day colonists. And, alas, in some ways his influence perpetuates and even exacerbates some of the old "problems" that bedevil our accounts of the origins of our bills of rights and that render those accounts less useful than they might be as part of our usable past.

No doubt, one of the chief benefits of Reid's rapidly amassing scholarship is that, if only by dint of his obvious erudition, he puts the burden on us to "take seriously"³⁸ the colonists' rights talk as something more than a mere function of their peculiarly "ideological" politics.³⁹ Moreover, he presses us, as readers have not been much pressed for decades,⁴⁰ to take that rights talk seriously as talk *about law*. Thus, among current historians of colonial and Revolutionary America, Reid is *the* legalist *par excellence*. But, one might argue — as more than one reviewer has sharply argued — that in taking the lead in rehabilitating the importance of a legalistic perspective on the development of eighteenth-century American constitutionalism,⁴¹ Reid is propounding an exceedingly limited conception of "law." And it is a conception almost hermetically sealed, at that.

In Reid's important volume purporting to explain to us "the authority of rights" in the hearts and minds of late-eighteenth-century Americans, and in his other most closely related books, he expressly reduces the meaning of "law" in America completely to the "taught tradition" of Coke, that is, the received "ideology" of the seventeenth-century *English* common law. Accordingly, in Reid's view, investigation of the "jurisprudential history" of eighteenth-century America should "concentrate on concepts, ideas, and even semantic usage. . . . [by forthrightly addressing l]aw as an abstraction." Indeed, in his attempts to represent the authentic significance of legal and legalistic concepts, Reid insists not just that a concept like "rights" should be studied exclusively as a matter of "intellectual history," without reference to contemporary social and economic circumstances, but that the "manifest reality" of such a concept in its day was that it stood "in isolation. . . from social and economic

38. See Eben Moglen, Book Review, 9 LAW AND HIST. REV. 389, 390, 397 (1991).

39. Cf. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 31 (1986) (on the role of law in the origins of the Revolution) (Pulitzer-Prize winning book).

40. See Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157, 1158 nn.3-8 (1976).

41. See, e.g., Jack P. Greene, *From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution*, S. ATLANTIC Q. 56 (1986).

considerations" — and in isolation from every other category of extra-legal thought, even, nay, especially, political thought.⁴² As the reviewer Sandra VanBurkleo has put it, "For Reid, eighteenth-century common law ideology is a well-ordered intellectual shell."⁴³ Reid, then, would seem to be attempting to turn the study of eighteenth-century American constitutional history *away* from the pursuit of a "systematic understanding of how law relates to society." It is not merely that, for Reid, the "context" of rights talk as law talk is secondary; context simply does not exist.⁴⁴

What Reid has accomplished by means of his resolute disregard of context is very important: he has succeeded more than anyone before him in reconstructing, as it were, the authentically righteous, indeed, self-righteous, voice of eighteenth-century whig legalism.⁴⁵ And, in accomplishing this feat of reconstruction, he scrupulously disclaims any pretense to be giving us a study of constitutional theory in general. But the focus and emphasis of his work have undeniable implications for how we are to understand early American constitutional theory.

For example, in elaborately restoring the web of meanings and connotations of the whig "dogma" that defined "liberty," "the rule of law," and "constitutionalism" itself in terms of property⁴⁶ — and thus in arguing that an essentially propertarian general conception of rights in America was legally entailed by English common law — Reid distracts attention from, if he does not foreclose, questions about both the development and the effects of this historic conceptualization of the idea of rights as a derivative of the idea of property. For Reid contends that the English common-law tradition *determined* that Americans would, and had to, conceive of rights as property and, in fact, largely as incidents of property. That point is likely to ring true to anyone who has read the records of the Federal Convention of 1787, where delegate after delegate, except for James Wilson, spoke up to endorse a putative social consensus that the chief purpose of government is the protection of property and, more to the point, the protection of the rights of property.⁴⁷ But this "ring

42. REID, *THE CONCEPT OF LIBERTY*, *supra* note 37, at 1-3.

43. Sandra F. Van Burkleo, Book Review, 33 AM. J. OF LEGAL HIST. 378, 385 (1989).

44. See, e.g., Moglen, *supra* note 38, at 396.

45. See Stephen A. Conrad, *The Constitutionalism of "the Common-law Mind,"* 13 LAW & SOCIAL INQUIRY 619 (1988); Stephen Conrad, Book Review, 45 WM. & MARY Q. 775 (1988).

46. See REID, *THE AUTHORITY OF RIGHTS*, *supra* note 36, *passim*.

47. See, e.g., I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 605 (Max Farrand ed., 1937).

of truth" as to the testimony of the Framers hardly amounts to comprehensive "constitutional history" (as Reid acknowledges); nor does it afford sufficient grounds for accepting Reid's determinism, or for resting content with his disregard of context and effects.

Still, amid the predominating, albeit understandable, neo-whig revivalism of the Bicentennial Moment, a late entry into the scholarly literature of the moment like Jennifer Nedelsky's 1990 book *Private Property and the Limits of American Constitutionalism* can seem, alas, somehow deviant, if not downright un-Anglo-American. She says, for example, in the introduction of her book, that:

treating the protection of unequal property as the paradigm case of protecting individual rights in a democracy led [at the Founding] to a misconception of the complex relation between democracy and individual autonomy, which is the true problem of constitutionalism. . . . The Framers' preoccupation with property generated a shallow conception of democracy and a system of institutions that allocates political power unequally and fails to foster political participation.⁴⁸

Nedelsky then proceeds to give us a bracing and subtle book that moves us past the old business of simply authenticating the distinctively propertarian character of the libertarianism of the Anglo-American rights tradition. She faces up to the problems of that articulate propertarian reduction of the concepts of rights and liberty at the Founding and afterwards. More obviously politically engaged, but perhaps at bottom really no more so engaged, than the many neo-whig historians I have named thus far, Nedelsky gives us critical history that is intellectually and jurisprudentially important in great part because it insists on our taking into account an expanded range of historical experience, both in terms of chronology and in terms of society.

But even with her welcome expansion of scope, which sustains a revisionist interpretation of the Founding and its legacy in relation to one another, what Nedelsky's enrichment of the "origins"-and-"sources" approach fails to bring into view is both the contingency and the ambiguity of the national ("Madisonian") rights tradition

48. JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 3, 1 (1990). For a rather different perspective, see JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1992).

she critiques. In fact, I believe that no historian concerned with these matters of contingency and ambiguity thinks that we yet know as much as we should or could in these respects. It seems that much of the hard work remains yet to be done in uncovering and explaining the historical data that could give us an appreciation of how the varieties of rights talk actually developed in the ways they did so as to be codified in bills of rights in the last quarter of the eighteenth century. But there is already some exemplary work in print that contributes towards this end. Perhaps our best general historical studies of the "origins" of our bills of rights will begin incorporating the lessons of this work.

A good example of the sort of exemplary work I have in mind is the ongoing research of John Murrin and A. G. Roeber on that historically talismanic common-law right that became a part of the federal Bill of Rights in more ways than one: trial by jury. In a recent, co-authored article entitled "Trial by Jury: The Virginia Paradox,"⁴⁹ Murrin and Roeber examine the ordinary-law background of this "right" in Virginia, as disclosed in legislation and court practice, across the span of the entire colonial period. And, very much, I think, in accord with the leading "interpretive frameworks"⁵⁰ in early American historiography today, they trace a distinctively indigenous American legal history that sheds new light on discontinuities over time, and among colonies and regions, when it comes to the true "origins" of the constitutional "tradition" invoked during the Revolution and the Founding. As Murrin and Roeber put it, the salient "facts" in the "origins"-and-"sources" historiography "suggest a passionate commitment to juries among educated Virginians during the American Revolution. If we look further back than the 1760s, however, the picture is less clear."⁵¹

As to the remarkable variety in the access to juries and how they were actually used in the several colonies, Murrin and Roeber note a key factor that has usually been overlooked: "We can explain this astonishing variety only by realizing that the early settlers inherited a thoroughly ambiguous tradition from the mother country."⁵² Moreover, with that factor squarely recognized, the way is open to understand better the strikingly fitful development of the rights to,

49. John M. Murrin and A. G. Roeber, *Trial by Jury: The Virginia Paradox*, in *THE BILL OF RIGHTS: A LIVELY HERITAGE* 109 (John Kukla ed., 1987).

50. See Jack P. Greene, *Interpretive Frameworks: The Quest for Intellectual Order in Early American History*, 48 *WM. & MARY Q.* 515 (1991).

51. Murrin and Roeber, *supra* note 49, at 109-10.

52. *Id.* at 112.

and the rights of, juries in colonial Virginia. Assiduous reading of court records and careful attention to the vagaries of colonial legislation promulgated from Williamsburg reveal that:

White Virginians welcomed juries in three stages. Jury trials for capital offenses were secure by the 1630s. Civil juries had a more checkered history. Seldom used until the 1640s, they were at least available thereafter. By the late seventeenth century, a typical county had witnessed a few civil trials by jury each year, but the justices dispatched the bulk of civil business. . . . After a halting growth in the late seventeenth century, the criminal jury virtually disappeared in the first half of the eighteenth century . . . and won a significant place for itself only after 1750. . . .⁵³

Most surprising, perhaps, at least in light of the propertarian rhetoric of liberty during the Revolution and the Founding, Virginians far into the eighteenth century "got along well month after month, year after year, without using petit juries [even in debt-collection cases]. . . . Virginians trusted the wisdom of the gentlemen justices of the county court."⁵⁴

After a lowering of property qualifications for jurors that was enacted in 1748, there was a noticeable change in this pattern, and in public discourse; and "in the decade before 1776, as a whole, juries more often became a political issue when property, not life or liberty, was at stake."⁵⁵ Thus, when the right to trial by jury is examined in terms of institutional practice and against the contemporary social and economic background, the synchronic common-law ideology of ancient and immemorial rights loses much of its force in explaining the "origins" of two of the provisions in our Bill of Rights:

Because articles 8 and 11 of the Virginia Declaration of Rights were the antecedents of articles 6 and 7 of the Bill of Rights, they must be understood in the local context of Virginia's legal history. One need not look for stirring and sensational issues to explain why eighteenth-century farmers and merchants were sensitive about an institution that only recently they had begun using frequently.⁵⁶

In Murrin and Roeber's article, which is but a sample of the results of their arduous researches, there is, then, compelling evidence that

53. *Id.* at 113.

54. *Id.* at 122.

55. *Id.* at 124, 127.

56. *Id.* at 128.

early American constitutionalism developed quite differently from the rather linear, if sometimes interrupted, progress that is limned by the still prevailing "origins"-and-"sources" account of the Bill of Rights. In the story Murrin and Roeber tell, there is a sense of contingency — a sense of political, and social, and economic choices continually being made as matters of policy — that lay behind the whig tradition of common-law constitutionalism. In fact, Murrin and Roeber go further, by giving us a sense of a volitional early American constitutionalism that was a function not only of contingencies but also of the inherent ambiguity altogether authentic to the tradition.

This now increasingly perceived feature of early American constitutionalism — its chronic ambiguity — is most pointedly and persuasively emphasized, I believe, in the writings of Murrin's and Roeber's fellow historian of colonial America David Konig.⁵⁷ Like Murrin and Roeber, Konig has investigated in great detail surviving records of ordinary legal practice in colonial Virginia. And what he has learned and shared from his investigation provides an invaluable supplement and complement to some of our best informed accounts of what we thought we "knew" about the "origins" of the Bill of Rights.

For example, my fellow participant in this symposium Robert Palmer has given us what may be the best study we have to date in support of the important point that, during the great debate on a federal bill of rights during the Ratification period, "[t]he concern for individual rights in the debate was not concern for rights as such, not a concern for individuals and individualism, but for rights vis-a-vis [*sic*] the federal government."⁵⁸ That is a proposition the importance of which I would be loath to challenge as part of the explanation of the proximate "origins" of the federal Bill of Rights.

Nevertheless, I am also persuaded by Konig that, when it comes to understanding the origins of the Bill of Rights in terms of arrangements between respective territorial spheres, of politics and of jurisdiction, there is more to the story than is captured in Palmer's proposition. For example, in a recently published essay, Konig returns to the phenomenon of so many "uncertainties and turnabouts" in

57. My own predisposition to such an emphasis on ambiguity is confessed at length in Stephen A. Conrad, *Metaphor and Imagination in James Wilson's Theory of Federal Union*, 13 LAW & SOC. INQUIRY 1 *passim* (1988) (especially at 4).

58. Robert C. Palmer, *Liberties as Constitutional Provisions*, in LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 115 (1987).

the very same Ratification debates on which Palmer focuses. Yet Konig finds that these debates

reflect more than a simple disagreement over state's rights. State's rights certainly were one manifestation of the debate, but at bottom these uncertainties and reversals reflected, simultaneously, a consensus on rights but an imperfectly worked out notion of how best to establish them through practical provisions. *That* assertion will not surprise many historians, but it is a proposition that requires us to break new ground in understanding exactly what institutional arrangements Virginians had come to rely upon for protecting their rights in the eighteenth century.⁵⁹

The piece of ground that Konig breaks in his essay has to do with the complexity of the relationship in practice between two fundamental values in the common-law tradition: on the one hand, the securing of "due process"; and on the other hand, the authority of local custom:

Throughout the Richmond debates [on Ratification] a single thread is woven — a recurring theme in general, with a recurring specific concern. The concern is the reliance on local institutions to preserve a larger conception of rights. These were not state's rights, but the right to a body of justice that protects the liberty and property of the community. . . . But [at the same time there was concern that this right] might require reinforcement through the operation of a "constitution paramount to government." [citation omitted] In colonial Virginia, this had taken the form of a balance between the locality and provincial institutions that could not be easily reduced to iron rules or express wording.⁶⁰

In the context of long-standing concern in colonial Virginia over this problem of how to balance, or provide for mutual reinforcement of, these two competing fundamental values, the Ratification debate in Virginia comes to look like "a debate writ large from struggles going on in Virginia to preserve local [county] justice even from interference by other parts of Virginia."⁶¹ Indeed, on the evidence that Konig adduces,⁶² his point seems indispensable as a part of any comprehen-

59. David T. Konig, *Natural Rights, Bills of Rights, and the People's Rights in Virginia Constitutional Discourse, 1787-1791*, in *THE SOUTH'S ROLE IN THE CREATION OF THE BILL OF RIGHTS* 36 (Robert J. Haws ed., 1991).

60. *Id.* at 43-44.

61. *Id.* at 45.

62. See, e.g., David T. Konig, *Country Justice: The Rural Roots of Constitutionalism in Prerevolutionary Virginia*, in *AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY*

sive understanding of the Virginia origins of the Bill of Rights. And a very important part of the larger, national story of "origins" those Virginia origins are. Now it appears that they cannot be really understood at all except with the added new light that the work of colonial legal historians is casting on them.

IV.

The exemplary work of colonial legal historians like Murrin, Roeber, and Konig is by no means restricted to the endeavors of a small band crying in the woods. In fact, the significance of the work of each of those three, and others like them, has been widely recognized among the most discerning scholars and students of colonial American history in general for a long time now. But, if only because I myself have been slow to explore such work, and to begin to catch on to its importance, I am sensitive to the problem that it is imprudently neglected by all too many of us, in law schools and elsewhere in the academy, who try to understand and explain the "origins" of the uniquely American constitutionalism that we have been celebrating during the Bicentennial Moment. Presumptuously, to be sure — since I am no scholar, but only a beginning student, of colonial legal history; and since I have in large part but repeated here a message that others like Stanley Katz have conveyed before and better — I offer the foregoing remarks, respectfully, as a word to the wise.

OF THE SOUTH 63 (Kermit L. Hall & James W. Ely, Jr., eds., 1989); David T. Konig, *Colonization and the Common Law in Ireland and Virginia, 1569-1634*, in *THE TRANSFORMATION OF EARLY AMERICAN HISTORY: SOCIETY, AUTHORITY, AND IDEOLOGY* 70-92, 276-280 (James A. Henretta et al. eds., 1991).